

IV. DISCUSSION

We decide that KLPD is not able make a case that would support the granting of authority for the District to serve the portions of the Town of Kennebunk that are presently served by CMP. We decide that there are no circumstances or facts stated in KLPD's petition that would permit us to find that there is a "public need" for KLPD to provide such service. We therefore terminate this proceeding.²

A. Standards for Authority to Provide Service

KLPD filed its petition for authority to serve the entire Town of Kennebunk pursuant to 35-A M.R.S.A. § 2110. The parties have effectively agreed that section 2110 incorporates the standard contained in 35-A M.R.S.A. §§ 2102 and 2105 (whether "the public convenience and necessity require a second utility")³ and that we should apply that standard to the question of

² In making these rulings, we apply the standard of Me.R.Civ.P. 12(b)(6) ("failure to state a claim upon which relief may be granted"). Under that standard, a party does not state a claim if, even assuming it could prove all of the facts stated in the complaint (petition), it is not legally entitled to the "relief" (or decision) that it seeks in the complaint. We recognize that no party filed a motion to dismiss or formally raised KLPD's "failure to state a claim" as a defense in an "answer," the two methods described in Civil Rule 12(b). Nevertheless, the substance of CMP's arguments (in its brief and its exceptions) is that KLPD has failed to present a legal basis for allowing it to provide service in the portion of Kennebunk served by CMP. We of course have the discretion to terminate any proceeding when it becomes clear that we cannot legally do what a party has requested. Doing so when that circumstance becomes apparent, even when there is no formal motion, saves the resources of the parties and the Commission.

³ Section 2110 applies to utilities, such as KLPD, that are organized by Private and Special Act of the Legislature. Section 2110 states in relevant part:

A public utility organized by Private and Special Act of the Legislature may extend its services as follows:

1. Commission authorization. The commission may authorize a public utility organized by private and

[footnote 3 continued]

special act of Legislature to furnish or extend its service in, to or through a city or town notwithstanding any territorial limitations, express or implied, in the private and special act of the Legislature by which it was organized or under which it is enfranchised. ---

Within 20 days after the commission's final authorization, the public utility shall file a certificate that shows the authorization with and pay \$20 to the Secretary of State. When the certificate is filed, the public utility's power to extend its service becomes effective.

2. The commission's powers and limitations. The commission's powers and limitations, made applicable under this section, are those applicable by law in like cases concerning public utilities organized under Title 13-A or any prior general corporation law.

The reference in section 2110(2) (formerly 35 M.R.S.A. § 294) to the law that is applicable to "public utilities organized under Title 13-A or any prior general corporation law" (so-called "general law" utilities) is a reference to 35-A M.R.S.A. §§ 2102 and 2105 (formerly 35 M.R.S.A. §§ 2301 and 2302) (~~hereinafter the "second utility" statutes~~). See *Biddeford & Saco Gas Co. v. Portland Gas Light Co.*, 233 A. 2d 730, 734-36 (Me. 1967). Prior to 1967, ~~35 M.R.S.A. §§ 2301-02~~ ~~the second utility statutes on their faces~~ applied only to "general law" utilities. Amendments effective in 1967 applied them for the first time to so-called "charter" utilities (those organized pursuant to Private and Special Law), such as KLPD. Thus, after the 1967 amendments, the requirements of ~~35 M.R.S.A. §§ 2301-02 / 35-A M.R.S.A. §§ 2102 and 2105~~ ~~the second utility statutes~~ applied ~~directly~~ to all utilities. It ~~appears~~ might be questioned, therefore, ~~that the incorporation of those sections by 35 M.R.S.A. § 294 (now whether 35-A M.R.S.A. § 2110 (and its incorporation of the standard used in sections 2102-05) is no longer necessary~~ has any remaining purpose. ~~Nevertheless, section 2110 continues to apply on its face only to charter utilities and continues to cross-refer to and incorporate the provisions formerly applicable only to "general law" utilities (i.e., sections 2102 and 2105) for the substantive powers of the Commission with regard to a request to expand a service area. Section 2110 is effectively nullified by the fact that section 2102 and 2105 themselves now apply directly to charter utilities.~~

We believe it is possible that section 2110 addresses a different concern than ~~that addressed by~~ the "second utility" statutes, i.e., the matter of corporate

whether the Commission should permit the District to extend its service throughout the Town of Kennebunk.

[footnote 3 continued] authority or power (including that of entities such as public districts and municipalities) to perform certain functions. Even if the Commission, under 35-A M.R.S.A. §§ 2102-05, authorizes a utility to provide service in an area served by another utility, it does not follow that the utility possesses the corporate power to do so if its legislative charter (or its articles of incorporation, in the case of a general law utility) do not permit that function. The notion that section 2110 is designed to provide a mechanism to eliminate any charter limitations on an expansion of service territory is supported by the statute's requirement that the charter utility, after approval by the Commission under 2110, must file the certificate issued by the Commission with the Secretary of State, along with a filing fee of \$20. It may be further supported by the fact that section 2110 applies to all expansions by a charter utility, not just those in which it would be the second utility.

As noted above, section 2110 directs the Commission to apply the standard that it must apply under the second utility statute to authorize a second utility ("public convenience and necessity"). Nevertheless, if it is correct that section 2110 addresses corporate power, then the Commission action that takes place under each statute is quite different. ~~We prefer (if only to prevent the need for explanations such as the foregoing) for all utilities that wish to expand their service areas to file their requests under section 2102(1).~~ Without formally interpreting section 2110, we would offer the following guidance. If a charter utility believes it is necessary to obtain approval under 2110 in order to expand its corporate power, it may file under that section. If it is seeking authority to provide service in an area served by another utility or where another utility has the authority to provide service, it must also file under section 2102.